

FEB 23 1983

ALEXANDER L. STEVENS,  
CLERK

No. 82-962

---

# In the Supreme Court of the United States

OCTOBER TERM, 1982

---

**PATSY M. THOMAS AND GREGORY RANDALL THOMAS,  
ETC., PETITIONERS**

v.

**UNITED STATES OF AMERICA**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT (FORMERLY THE  
UNITED STATES COURT OF CLAIMS)**

---

## **BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**REX E. LEE**  
*Solicitor General*

**J. PAUL McGRATH**  
*Assistant Attorney General*

**ANTHONY J. STEINMEYER**  
**MARGARET E. McCLOSKEY**  
*Attorneys*

*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*

---

---

### **QUESTIONS PRESENTED**

- 1. Whether the lawful inclusion of a witness in the United States Marshals Service Witness Protection Program effected a Fifth Amendment taking of the rights of his estranged wife and his child to enforce his child support obligations under a separation agreement.**
- 2. Whether, by enactment of Section 502 of the Organized Crime Control Act of 1970, the United States has consented to be sued for damages to redress the Attorney General's failure to make support payments to petitioners.**
- 3. Whether the inclusion of petitioners' husband and father in the Witness Protection Program impaired state authority over domestic relations in violation of the Tenth Amendment.**
- 4. Whether, by suspending discovery pending a decision on the government's motion for summary judgment, the Court of Claims deprived petitioners of due process of law.**

**(I)**

## TABLE OF CONTENTS

	Page
Opinion below .....	1
Jurisdiction .....	1
Statement .....	2
Argument .....	4
Conclusion .....	8
Appendix .....	1a

## TABLE OF AUTHORITIES

### Cases:

<i>Armstrong v. United States</i> , 364 U.S. 40 .....	5
<i>Doe v. Civiletti</i> , 635 F.2d 88 .....	6
<i>Eastport S.S. Corp. v. United States</i> , 372 F.2d 1002 .....	6
<i>Fry v. United States</i> , 421 U.S. 542 .....	8
<i>Garcia v. United States</i> , 666 F.2d 960, petition for cert. pending, No. 82-5934 (filed Dec. 22, 1982) .....	6
<i>Glidden, In re</i> , 653 F.2d 85, cert. denied, 454 U.S. 1143 .....	7
<i>Lawn v. United States</i> , 355 U.S. 339 .....	6-7
<i>Linda R.S. v. Richard D.</i> , 410 U.S. 614 .....	7
<i>Melo-Tone Vending, Inc. v. United States</i> , 666 F.2d 687 .....	5, 6
<i>National League of Cities v. Usery</i> , 426 U.S. 833 .....	7, 8
<i>Omnia Commercial Co. v. United States</i> , 261 U.S. 502 .....	4, 5

	Page
<b>Cases—Continued:</b>	
<i>Penn Central Transportation Co. v. New York City</i> , 438 U.S. 104 .....	5
<i>United States v. King</i> , 395 U.S. 1 .....	6
<i>United States v. Lovasco</i> , 431 U.S. 783 .....	6
<i>United States v. Sherwood</i> , 312 U.S. 584 .....	6
<i>United States v. Testan</i> , 424 U.S. 392 .....	6
<i>Warth v. Seldin</i> , 422 U.S. 490 .....	7
<b>Constitution and statutes:</b>	
<i>United States Const.:</i>	
Article I, Section 8, Commerce Clause .....	8
Fifth Amendment .....	4
Tenth Amendment .....	7
<i>Organized Crime Control Act of 1970</i> , Pub. L. No. 91-452, 84 Stat. 922 <i>et seq.</i> .....	4
Sections 501-504, 84 Stat. 933 <i>et seq.</i> .....	2
Section 502, 84 Stat. 933 .....	3, 4, 5, 6, 7

In the Supreme Court of the United States  
OCTOBER TERM, 1982

---

No. 82-962

PATSY M. THOMAS AND GREGORY RANDALL THOMAS,  
ETC., PETITIONERS

v.  
UNITED STATES OF AMERICA

---

***ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT (FORMERLY THE  
UNITED STATES COURT OF CLAIMS)***

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**OPINION BELOW**

The opinion of the Court of Claims (Pet. App. A-1 to A-10) is not reported.

**JURISDICTION**

The judgment of the Court of Claims was entered on September 10, 1982. The petition for a writ of certiorari was filed on December 8, 1982. The jurisdiction of this Court is invoked under former 28 U.S.C. 1255(1).<sup>2</sup>

---

<sup>1</sup>The former Court of Claims' appellate functions were assumed by the new United States Court of Appeals for the Federal Circuit effective October 1, 1982. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 37-38, 57. See note 2, *infra*.

<sup>2</sup>As petitioners observe (Pet. 7), 28 U.S.C. 1255 was repealed effective October 1, 1982, by Sections 123 and 402 of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 36, 57. Although

**STATEMENT**

Petitioner Patsy Thomas and her husband William R. Thomas had a child, petitioner Gregory Randall Thomas, in 1969. The couple subsequently separated and, in July 1974, entered into a separation agreement requiring the payment of child support. William Thomas made support payments pursuant to that agreement only sporadically prior to May 1975. Since that time, Thomas has not provided any support for his son (Pet. App. A-2).

In September 1976, the United States Marshals Service accepted William Thomas (hereinafter "Thomas") into its Witness Protection Program to protect him from retaliation by persons against whom he had testified as a government witness at certain trials.<sup>3</sup> Petitioners did not enter the

---

the judgment of the Court of Claims was rendered prior to that date, the petition was not filed until after Section 1255 had been repealed. In addition, none of the provisions of Section 403 of the Federal Courts Improvement Act, which governs the transfer of pending cases from the Court of Claims, appears to address the availability of certiorari review of cases decided prior to October 1, 1982, but not filed in this Court until after that date. Nevertheless, we assume that for purposes of certiorari review this case may be deemed to have been automatically transferred to the new Federal Circuit on October 1, 1982, and that the jurisdiction of this Court may therefore properly be invoked under 28 U.S.C. 1254(1) in the present circumstances.

<sup>3</sup>The Witness Protection Program was established by Sections 501-504 of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 933 *et seq.*. The statute provides in pertinent part:

Sec. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.

Sec. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as

Witness Protection Program; Thomas had never requested that they be included. Pursuant to Witness Protection Program policies, Thomas was relocated from North Carolina, the area of maximum danger for him, and was given a new identity. The government provided a stipend to Thomas until February 1977, when his participation in the Witness Protection Program was terminated. Program files indicate that the Marshals Service has had no knowledge of Thomas' whereabouts since September 1977 (Pet. App. A-2 to A-3; Affidavit of Marilyn Mode, dated May 17, 1982, reproduced at App., *infra*, 1a-2a).<sup>4</sup>

On March 25, 1982, petitioners filed this action in the Court of Claims seeking compensation from the United States. Petitioners alleged that by admitting Thomas to the Witness Protection Program the government had taken their rights to child support payments in violation of the Fifth Amendment and that the government had violated Section 502 of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 933, by failing to provide for their health, safety and welfare (Pet. App. A-3 to A-4).

The Court of Claims dismissed petitioners' claims, holding that the government's action did not constitute a compensable constitutional taking of petitioners' property. The court reasoned that the admission of Thomas to the Witness Protection Program did not appropriate petitioners' right to collect and enforce payment of Thomas' support obligation but merely made it more difficult for petitioners to

---

Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. \* \* \*

<sup>4</sup>The cited affidavit is part of the record (see Pet. App. A-3).

locate him (Pet. App. A-4 to A-7). The court also held that it lacked jurisdiction over petitioners' claim for damages under the Organized Crime Control Act. The court observed that inclusion of individuals and payment of maintenance under that Act are entrusted to the Attorney General's discretion and that petitioners' claim accordingly did not state a cause of action (*id.* at A-8). Moreover, the court expressed doubt whether the Attorney General lawfully could have accepted petitioners into the Witness Protection Program under Section 502 because there was no claim that petitioners were placed in jeopardy by Thomas' testimony (Pet. App. A-9).

#### ARGUMENT

The Court of Claims correctly applied settled law, and its decision presents no conflict with any decision of this Court or any court of appeals. Further review is therefore unwarranted.

1. The gravamen of petitioners' Fifth Amendment claim is that because of Thomas' participation in the Witness Protection Program petitioners have been unable to locate him and thus have been frustrated in their attempt to enforce his child support obligation (Pet. 21-30). As the Court of Claims observed, however, "[f]rustration and appropriation are essentially different things" \* \* \* and the fifth amendment entitles a property owner to just compensation only for an appropriation" (Pet. App. A-5, quoting *Omnia Commercial Co. v. United States*, 261 U.S. 502, 513 (1923)). In *Omnia* the plaintiff claimed that the government had taken its contract right to purchase steel plate from a manufacturer at below market price by requisitioning that supply from the manufacturer before delivery was made. Although the Court recognized that the plaintiffs' rights in the contract constituted a property interest protected by the Fifth Amendment (261 U.S. at 508), it held that the injury to or destruction of the contractual property right did not

effect a taking of the right, but merely frustrated the performance of the contract. *Id.* at 508-514. The Court of Claims properly regarded *Omnia* as controlling here.

Petitioners seek to distinguish *Omnia* on the grounds that “[t]he governmental action [here] in no way prevented Mr. Thomas from complying with the contract with Mrs. Thomas” and did not cause “the contract \* \* \* [to] become void” (Pet. 26). But these circumstances only undercut petitioners’ position. The difficulty experienced by petitioners in enforcing the separation agreement is merely “consequential loss or injury resulting from lawful government action [for which] the law affords no remedy.” *Omnia Commercial Co. v. United States, supra*, 261 U.S. at 510; compare *Armstrong v. United States*, 364 U.S. 40, 49 (1960).<sup>5</sup> In any event, the ruling of the court below is in accord with the only other court of appeals decision that addresses this issue. *Melo-Tone Vending, Inc. v. United States*, 666 F.2d 687 (1st Cir. 1981).

2. The Court of Claims correctly held that it had no authority under Section 502 of the Organized Crime Control Act of 1970, to award damages for the Attorney General’s failure to make support payments to petitioners.

---

<sup>5</sup>Petitioners argue (Pet. 21-23) that this Court’s “Taking Clause” jurisprudence requires consideration of all the circumstances of the particular case, that no single consideration is controlling, and that the Court of Claims’ reliance upon the distinction between frustration and appropriation was accordingly error. It is true, of course, that the Court has noted its inability to devise any single formula that answers the taking question for every case. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-124 (1978). But that is no reason to question the continuing vitality of the doctrine of *Omnia Commercial Co.* The decision in *Penn Central Transportation Co.* itself makes clear that the presence or absence of an “appropriation” or “acquisition” of private resources by the government remains central to the taking inquiry. 438 U.S. at 128. Because the government did not acquire any part of petitioners’ contractual interest, but merely made more difficult its exercise, this analysis does not support petitioners’ claim.

The controlling principles are fundamental. The United States, as sovereign, cannot be sued without its consent. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity cannot be implied, but must be unequivocally expressed. *United States v. King*, 395 U.S. 1, 4 (1969). Finally, a waiver of sovereign immunity will be found only where the statute in question "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. Testan*, 424 U.S. 392, 400 (1976), quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967).

The language of Section 502 of the Organized Crime Control Act (see pages 2-3, note 3, *supra*) simply does not mandate payment of money to particular individuals in any circumstances, much less in the circumstances of this case. The courts of appeals accordingly have uniformly rejected the claim that Section 502 waives the sovereign immunity of the United States. *Doe v. Civiletti*, 635 F.2d 88, 94 (2d Cir. 1980); *Garcia v. United States*, 666 F.2d 960, 966 (5th Cir. 1982), petition for cert. pending, No. 82-5934 (filed Dec. 22, 1982); see also *Melo-Tone Vending, Inc. v. United States*, *supra*, 666 F.2d at 690. The Court of Claims correctly recognized the absence of a statutory waiver of sovereign immunity, observing that Section 502 vests the Attorney General with broad discretion in choosing individuals to participate in the Witness Protection Program and does not create any enforceable duty to pay compensation (Pet. App. A-8 to A-9).

3. Petitioners next contend (Pet. 30-32) that Thomas' participation in the Witness Protection Program unconstitutionally infringed the State of North Carolina's powers in the area of domestic relations. Petitioners did not raise this Tenth Amendment argument below and should not be permitted to press it here. See *United States v. Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *Lawn v. United States*,

355 U.S. 339, 362-363 n.16 (1958). Moreover, petitioners lack standing to raise this claim.

Petitioners assert that the federal government unconstitutionally interfered with the power of North Carolina to prosecute Thomas for failure to satisfy his support obligations and has forced the State to provide petitioners with welfare benefits. But as private citizens, petitioners lack a judicially cognizable interest in the prosecution or non-prosecution of another. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). Here, as in *Linda R.S.*, the prospect that criminal prosecution by the State would result in Thomas' payment of child support to petitioners is "speculative" (*id.* at 618). Petitioners' lack of standing to raise the Tenth Amendment claim is especially clear, because the right asserted is that of a third party, the State. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975).<sup>6</sup>

In any event, petitioners' Tenth Amendment claim is insubstantial. Neither the enactment of Section 502, nor the approval of Thomas' participation in the Witness Protection Program, "operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (*National League of Cities v. Usery*, 426 U.S. 833, 852 (1976)). See *In re Glidden*, 653 F.2d 85 (2d Cir. 1981), cert. denied, 454 U.S. 1143 (1982). Furthermore, the authority of the Attorney General to

---

<sup>6</sup>The Court has reserved the question whether anyone other than a state or its political subdivision has standing to raise a Tenth Amendment challenge to application of a federal statute. *National League of Cities v. Usery*, 426 U.S. 833, 836 n.7 (1976). Moreover, even if the government's approval of Thomas' participation in the Witness Protection Program infringed some right of the State, that would not support petitioners' claim for damages. It has never been held that a state, much less a private party, may recover damages from the United States for violation of the Tenth Amendment.

arrange for the protection of witnesses does not depend upon the reach of the Commerce Clause. *National League of Cities v. Usery, supra*, and *Fry v. United States*, 421 U.S. 542 (1975), upon which petitioners rely, are accordingly inapposite. See *National League of Cities v. Usery, supra*, 426 U.S. at 852 n.16, 853 n.18.

4. Petitioners' final contention—unsupported by any authority—is that the Court of Claims' suspension of further discovery pending a decision on respondent's motion for summary judgment deprived petitioners of due process of law. This argument, which was not raised below, is without merit because the opinion of the Court of Claims reveals that the court assumed for purposes of deciding the summary judgment motion that the government's action had interfered with petitioners' ability to enforce Thomas' child support obligations (see Pet. App. A-2 to A-7). Additional facts said to be in dispute by petitioners (Pet. 35-36) simply are not material in view of the legal principles that dictated the decision in this case.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE  
*Solicitor General*

J. PAUL MCGRATH  
*Assistant Attorney General*

ANTHONY J. STEINMEYER  
MARGARET E. McCLOSKEY  
*Attorneys*

FEBRUARY 1983

**APPENDIX**  
**UNITED STATES COURT OF CLAIMS**

---

PATSY M. THOMAS AND )  
GREGORY R. THOMAS, )  
Plaintiffs, )  
v. ) C.A. No. 157-82-C  
UNITED STATES OF AMERICA, ) [May 17, 1982]  
Defendant. )  
 )

---

**AFFIDAVIT**

I, Marilyn Mode, being duly sworn, do hereby depose and say:

1. I am the Associate Chief for Planning and Evaluation of the Witness Security Division of the United States Marshals Service.

2. At the request of the Office of Legal Counsel of the Marshals Service, I have reviewed Witness Security files and records pertaining to William R. Thomas. My review of these files reveals the following facts concerning Mr. Thomas' participation in the Witness Protection Program:

a. William R. Thomas, the husband of Patsy Thomas, was authorized into the Witness Protection Program in September, 1976. Mr. Thomas' wife Patsy and his child Gregory were not authorized into the Program with him.

- b. Following Mr. Thomas' authorization into the Witness Protection Program, Mr. Thomas was immediately relocated by the United States Marshals Service from North Carolina, the danger area, to a safe location. This relocation occurred in September, 1976.
- c. Mr. Thomas was terminated from the Witness Protection Program in February, 1977. From the date of Mr. Thomas' termination in February, 1977 from the Witness Protection Program to the present, Mr. Thomas has received no Government subsistence from the United States Marshals Service. Moreover, Marshals Service records indicate that since September of 1977, Mr. Thomas' whereabouts have not been known by the Marshals Service.
- d. At the time of Mr. Thomas' authorization and participation in the Witness Protection Program, the United States Marshals Service had no knowledge or information concerning Mr. Thomas' alleged child support obligation to Patsy Thomas.

*/s/ MARILYN MODE*

---

**Marilyn Mode**